IN THE CIRCUIT COURT OF THE 11TH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA

GENERAL JURISDICTION DIVISION

CASE NO. 05-943 CA 05

PATRICIA WADE, THE FRIENDS OF REDLAND, INC.,

Plaintiffs,

vs.

MIAMI-DADE BOARD OF COUNTY COMMISSIONERS,

Defendant.
_____/

FINAL ORDER GRANTING DEFENDANT'S MOTION FOR JUDGMENT ON THE PLEADINGS

This matter is before the Court on Defendant Miami-Dade County's motion for judgment on the pleadings. The Court, having heard argument on the motion on April 28, 2005, considered the parties' memoranda and being otherwise duly advised, it is hereby ordered and adjudged that the motion is granted for the reasons that follow.

BACKGROUND

Plaintiff Patricia Wade is a resident of the Redland area of unincorporated Miami-Dade County. Plaintiff Friends of Redland is a corporation representing residents interested in incorporating a new city in the Redland. The two-count Complaint seeks mandatory, declaratory and injunctive relief "to permit the residents of the proposed area to vote for the proposed incorporation" of the Redland. *Complaint* at ¶ 13.

Count I is based upon the incorporation procedures set forth in Section 20-21 of the County Code and requests a writ of mandamus requiring the Commission to take specified steps to move the Plaintiffs' incorporation request forward "forthwith."[1] In Count II, the Plaintiffs seek a declaration that the County's incorporation procedures are unconstitutional because they do not treat all requests for incorporation the same and have resulted in indefinite delay in the consideration of the incorporation request for no rational reason. The Plaintiffs request the removal of these allegedly unconstitutional obstacles in order to vindicate a purported "right of pursuing their incorporation" and a "vote of self-determination." *Complaint* at ¶ 2.

DISCUSSION

In order to obtain "a writ of mandamus, the petitioner must demonstrate [1] a clear legal right to the performance of a ministerial duty by the respondent and [2] that no other adequate remedy exists." *Morse Diesel Intern. v. 2000 Island Blvd.*, 698 So. 2d 309, 312 (Fla. 3rd DCA 1997); *accord*, *Borja v. NationsBank of Florida, N.A.*, 698 So.2d 280 (Fla. 3rd DCA 1997); *Fraternal Order of Police v. Odio,* 491 So.2d 339 (Fla. 3rd DCA 1986). Mandamus is not available in this case because the Plaintiffs cannot satisfy either of these two requirements. There is no clear legal right to pursue the incorporation of a city or to a public hearing within a set period of time to consider a request for incorporation. To the extent the Plaintiffs are seeking a declaration that the County's existing procedures for incorporation are unconstitutional, an adequate legal remedy exists in the form of a complaint for declaratory relief. The only declaration the Plaintiffs are entitled to, however, is a declaration that the County's procedures are in fact constitutional.

[1] Specifically, Count I requests that the Board be mandated to "conduct a public hearing forthwith," "certify the results" (i.e., certify that the petition has the requisite number of valid signatures), "refer[] [the petition] to the Planning Advisory Board" and "set[] [a] schedule for consideration of the incorporation efforts."

I. THE PLAINTIFFS DO NOT HAVE A CLEAR LEGAL RIGHT TO THE MANDAMUS RELIEF THEY SEEK.

The Plaintiffs ask the Court to issue a writ of mandamus directing the County to conduct a public hearing forthwith to consider their request to incorporate a new city in the Redland. There is no clear legal right to the relief the Plaintiffs seek.

A. There Is No Clear Legal Right to Incorporate A New Municipality.

The Petition is based on the premise that individual residents of the Redland have a "vested right for the County to consider [their] incorporation application in a timely fashion," *Complaint* at ¶ 55, and thereafter "to permit the residents of the proposed area to vote. *Complaint* ¶ 13. There simply is no such right.

In *Hunter v. City of Pittsburgh,* 207 U.S. 161, 28 S.Ct. 40, 52 L.Ed. 151 (1907), the Supreme Court held that the authority to establish municipalities is one of the powers reserved to the states by the Tenth Amendment. The similarities between this case and *Hunter* are striking. The *Hunter* plaintiffs, a citizens group from Allegheny, a small city adjacent to Pittsburgh, filed a complaint challenging the constitutionality of a proposal to unite Allegheny with Pittsburgh without their express consent. The essence of their claim was indistinguishable from what the Plaintiffs argue here: that they had a fundamental constitutional right to decide whether they wished to be included in a larger metropolitan unit. The only difference between this case and *Hunter* is that the Allegheny citizens were seeking to prevent a larger government from absorbing them, while the Plaintiffs in this action are seeking to remove themselves from a government in which they are already included. Like the Plaintiffs in this action, the essence of the Allegheny citizens' complaint was their assertion of a constitutional right to determine their own form of local government.

The Supreme Court held that issues regarding the establishment and structure of local governments are committed solely to the discretion of the states:

> Municipal corporations are political subdivisions of the state, created as convenient agencies for exercising such of the government powers of the state as may be entrusted to them . . . . ***The number, nature and duration of the powers conferred upon these corporations and the territory over which they shall be exercised rests in the absolute discretion of the State . . . . The State, therefore, at its pleasure, may modify or withdraw all such powers, may take without compensation such property, hold it itself, or vest in other agencies, expand or contract the territorial area, unite the whole or a part of it with another municipality, repeal the charter and destroy the corporation. All this may be done, conditionally or unconditionally, with or without the consent of the citizens, or even against their protest. In all these respects, the state is supreme, and its legislative body, confirming its action to the state Constitution, may do as it will, unrestrained by any provision of the Constitution of the United States.*** Although the inhabitants and property owners may, by such changes, suffer inconvenience and their property be lessened in value by the burden of increased taxation, . . . there is nothing in the Federal Constitution which protects them from these injurious consequences. The power is in the State and those who legislate for the State are alone responsible for any unjust or oppressive exercise of it.

Id. at 178, 28 S.Ct. at 46 (emphasis added). *See also Washington v. Seattle School Dist.*, 458 U.S. 457, 470, 102 S.Ct. 3187, 3194-95, 73 L.Ed.2d 896 (1982); *Reynolds v. Simms,* 377 U.S. 533, 575, 84 S.Ct. 1362, 1388, 12 L.Ed.2d 506 (1964).

The States' "absolute discretion" to create municipalities "with or without the consent of the citizens, or even against their protest" forecloses the Plaintiffs' argument that there is any constitutional right to municipal incorporation. *Hunter,* 207 U.S. at 178. *See* Briffault, R., Who Rules at Home? One Person/One Vote and Local Governments, 60 U. Chi. L. Rev. 339, 395 (1993). As the Supreme Court of California cautioned when residents of Sacramento County sought to incorporate under similar circumstances, the Constitution does not give citizens the "right to compel the state to provide any electoral mechanism whatever for changes of municipal organization. Such line-drawing is a function that the Legislature may reserve to itself." *Board*

of Supervisors of Sacramento County v. Local Agency Formation Commission of Sacramento County, 838 P.2d 1198, 1204 (Cal. 1992), *cert. denied*, 505 U.S. 988 (1993).

In Miami-Dade County, issues of municipal incorporation are committed by the Florida Constitution and the Home Rule Charter to the County Commission. As the Third District explained in response to a similar challenge to the County Commission's authority over matters of municipal incorporation, the determination of whether to permit incorporation of a new municipality is "a purely discretionary political decision," which rests exclusively with the County Commission. *Miami-Dade County v. Palmetto Bay*, 744 So.2d 1076 (Fla. 3rd DCA 1999). In *Palmetto Bay*, as here, the Plaintiffs sought a writ of mandamus to compel the County to hold an election to determine whether to incorporate a city in south Miami-Dade County. The Court held:

> This case involves the interpretation of Section 5.05 of the Dade County Home Rule Charter which authorizes the "Board of County Commissioners *and only the Board* . . . [to] creat[e] . . . new municipalities in the unincorporated areas of the county after hearing the recommendations of the Planning Advisory Board, after a public hearing, and after an affirmative vote of a majority of the electors voting and residing within the proposed boundaries . . . ." (emphasis supplied).
>
> Appellees ask the Court to read into Section 5.05 a requirement that the Board must hold an election when considering *every* petition for incorporation. On the one hand, it is clear that the provision sets forth certain prerequisites to *authorizing* incorporation. However, we do not interpret this language as imposing an *obligation* on the Board to hold an election. Instead, we find that Section 5.05 authorizes the Board to make a purely discretionary political decision, to-wit: whether to move forward towards authorizing incorporation, and does not create an obligation to hold an election. *See* § 165.041, Fla. Stat. (1997); Code of Metropolitan Dade County, Fla., ch. 20, art. II (1998).
>
> As indicated above, one of the prerequisites that must be satisfied before the Board could authorize incorporation would be the holding of an election. However, the Board need only hold an election if, and only if, the Board makes the purely discretionary decision to move forward towards authorizing incorporation.

> Accordingly, as with all political decisions that are purely discretionary, because Appellees cannot demonstrate "a clear legal right to the performance of a ministerial duty" namely, the holding of an election, mandamus was inappropriately granted in the instant matter.

(All emphasis in original).

Just as there is no clear legal right to an election to decide whether a municipality should be incorporated, there is also no clear "vested right" to the consideration of their incorporation petition within a specified time period. *Complaint* ¶ 55, p.13 ¶ 4. The County has enacted an ordinance for the purpose of considering incorporation requests in an orderly manner, but nothing in that ordinance gives County citizens a vested right to incorporate a new city or otherwise detracts from the Commission's plenary authority over this political decision.

The Plaintiffs rely on § 20-21 of that ordinance, which provides:

> After receiving the Office of Management and Budget's determination that the petition is complete, the **Clerk** of the Board of County Commissioners **shall** schedule for public hearing the proposed petition for incorporation at a regular meeting of the Board of County Commissioners.
>
> (B) The **Clerk shall** advertise in a daily newspaper of general circulation that a petition for incorporation has been received and **shall** include in the advertisement the following information:
>
> (1) Map of the area proposed for incorporation,
>
> (2) Date of hearing for initial consideration by the Board of County Commissioners, and
>
> (3) Contact persons or departments where additional information may be provided.
>
> (C) The **Board of County Commissioners** at its initial public hearing for considering a petition for incorporation, after determining the requirements for showing of support set forth in Section 20-20 (A)(2) have been fulfilled, **may:**

(1) Establish an overall schedule for consideration of the petition, after receiving the County Manager's recommendation on such matter; and

(2) Refer the petition to the Planning Advisory Board for its review and recommendations.

(Emphasis supplied).

The ordinance does not create an individual right to incorporate a city. It merely states that upon satisfaction of certain conditions, the Clerk "shall" schedule a hearing at a regular meeting of the County Commission for the limited purpose of allowing the Commission, in its discretion, to consider whether to move forward with the incorporation process. Contrary to the Plaintiffs' suggestion, § 20-21 does not state that upon submission of an incorporation petition, the Commission "must determine that the requirements for public support has [sic] been shown and at the public hearing establish an overall schedule and refer the Petition to the Planning Advisory Board for review and recommendations." *Complaint* ¶ 40 (emphasis added). Instead, § 20-21(C) states that the County "may" establish an overall schedule and refer the petition to the Planning Advisory Board." The use of the term "may" makes clear that the County Commission has retained the discretion to determine whether to establish a schedule for further consideration of a petition for incorporation or to reject the petition outright. *See, e.g., In re Fletcher*, 664 So.2d 934, 936 (Fla. 1995) ("use of the word 'may' connotes discretion"); *In re Rules Regulating the Florida Bar*, 494 So.2d 977 (Fla. 1980) (Rules "cast in the term 'may' are permissive and define areas in which [there is] discretion."). Mandamus is, of course, not available to control the discretionary authority of a governmental board. *See Palmetto Bay; City of Coral Gables v. Worley*, 44 So.2d 298, 300 (Fla. 1950).

B. There Is No Clear Legal Right to A Public Hearing Before the County Commission "Forthwith."

The Plaintiffs argue that even if they have no legal right to demand that the County allow them to actually incorporate a new city, they are at least entitled to a public hearing "forthwith" for the Commission to consider the issue. The first problem with this argument is that the Plaintiffs simply have not been denied a hearing. The County Commission has merely decided to defer a hearing at this time.

Relying on County Code § 20-21, the Plaintiffs argue that the Commission cannot defer consideration of their incorporation request and must instead set a public hearing "forthwith." They point to nothing in the ordinance, however, that entitles them to a hearing "forthwith" or even to a hearing within any fixed period of time. As § 20-21 plainly states, the Clerk of the Board is required only to "schedule" a public hearing on a proposed petition for incorporation "at a regular meeting of the Board of County Commissioners." The Clerk is not required to schedule incorporation hearings "forthwith" (as the Plaintiffs demand) or even within a set number of days or weeks. Moreover, the Plaintiffs concede that the Clerk complied with the requirement that he schedule a public hearing by setting the Redland incorporation request for a hearing at the regular Commission meeting of December 14, 2004.

The fact that the Commission decided at that meeting to defer final resolution of the incorporation request does not detract from the fact that a hearing was scheduled as the ordinance requires. The Commission's rules of procedure, to which the public hearing was of course subject, specifically provide for the deferral of any matter for good cause and upon proper motion and approval of a majority of a quorum of the Commission. *See County Charter Citizen's Bill of Rights* Art. 7. In compliance with standard parliamentary procedure, a motion to defer takes precedence over a motion on the merits of a matter. *Miami-Dade County Code*, § 2.1, Rule 7.01(a).

Because the County ordinance does not provide a specific timetable for the consideration and resolution of an incorporation request, it follows that the determination of when to set such a request for hearing is left to the discretion of the Commission. *See, e.g., Dalehite v. United States,* 346 U.S. 15, 35-36, 73 S.Ct. 956, 967- 68, 97 L.Ed. 1427 (1953) (Governmental discretion includes "determinations made by executives or administrators in establishing plans, specifications or schedules of operations. Where there is room for policy judgment and decision there is discretion.") (emphasis added); *Jess Parrish Memorial Hosp. v. Florida Public Employees Relations Commission,* 364 So.2d 777, 784-785 (Fla. 1st DCA 1978) (quoting *Dalehite*); *City of Miami v. Kaiser*, 213 So.2d 449, 453 (Fla. 3rd DCA 1968) ("The courts have power to invalidate legislative enactments, but . . . may not control or direct legislation, under the doctrine of separation of powers. . . ."); *Parmelee v. T.L. Herbert & Sons,* 1930 WL 1750, *8 (Tenn. Ct. App,. 1930) (Where a "statute is silent as to the time when issues should be formulated and submitted, . . . it is left to the sound discretion of the" officials responsible to set their own schedule); *Lockhart v. Woollacott*, 41 P. 536, 537 (N.M.Terr. 1895) (Where a "statute is silent" as to when certain judicial acts are to be taken, the timing is left to the "sound discretion" of the presiding judge.).

Even when a statute or ordinance actually contains the term "shall" or other mandatory language dictating the time within which an act is to be performed, the failure to perform within the prescribed period does not foreclose the agency from acting subsequently. *See, e.g., AT&T Wireless v. Frazier,* 871 So.2d 939 (Fla. 1st DCA 2004) (Although workers' compensation statute stated that certain acts "shall" be performed within set time limits, the limits were merely directory, not mandatory, and therefore did do not foreclose judge from taking action outside the specified period.); *D.D. v. Department of Children and Families*, 849 So.2d 473 (Fla. 4th DCA 2003) (statute's 30-day time limitation during which to hold an adjudicatory hearing in a

dependency case did not preclude court from conducting hearing after that period); *State, Dept. of Transp. v. Florida Com'n on Human Relations* 842 So.2d 253, 256 (Fla. 1st DCA 2003) ("[A]s a general rule statutes setting the time when a thing is to be done are regarded as merely directory, where no provision restraining the doing of it after that time is included and the act in question is not one upon which court jurisdiction depends."); *In re Cross Key Waterways v. Askew*, 351 So.2d 1062 (Fla. 1st DCA 1977) (failure to file a rule within the 45-day statutory period did not render it invalid, because tardiness is not "a material error in procedure"); *Schneider v. Gustafson Industries, Inc.,* 139 So.2d 423, 425 (Fla.1962).

Without some language in the County Code requiring a public hearing within a specified time period, the Plaintiffs simply cannot show that they have a clear legal right to a hearing "forthwith." Because §20-21 does not require a hearing "forthwith" or even within a set period, it is left to the County Commission's discretion to decide when to consider the Plaintiffs' request for incorporation. Mandamus will not issue to direct the performance of such a clearly discretionary act. Where "the officer or body is allowed a discretion as to <u>when</u> the ministerial act shall be performed . . . such performance will not be enforced by the writ of mandamus." *Gamble v. State*, 61 Fla. 233, 244, 54 So. 370, 373-374 (Fla.1911) (emphasis added); *accord, City of Coral Gables v. State ex rel. Worley*, 44 So.2d 298, 300 (Fla. 1950) ("If the discharge of the duty requires the exercise of judgment or discretion the act is not ministerial and mandamus will not lie."); *Orange County v. Quadrangle Development Co.*, 780 So.2d 994, 996 (Fla. 5th DCA 2001) ("Mandamus is generally not available to control the discretionary authority of a governmental board.").

II. THE PLAINTIFFS HAVE AN ADEQUATE LEGAL REMEDY IN THE FORM OF A COMPLAINT FOR DECLARATORY RELIEF.

Mandamus is not available when any other legal remedy is available. *See Pino v. Dist. Court of Appeal, Third Dist.,* 604 So.2d 1232 (Fla. 1992). In Count II, the Plaintiffs seek a

declaration that the County's incorporation procedures are unconstitutional. The fact that they have requested such relief clearly shows mandamus is not the only remedy available. Mandamus is not available when a petitioner can obtain the relief it seeks through a complaint for declaratory relief. *See, e.g., Williams v. Schulman, on Behalf of School Bd. of Palm Beach County*, 721 So.2d 1244, 1245 (Fla. 4th DCA 1998) (petitioner not entitled to mandamus because he was also pursuing a "separate suit for declaratory relief and money damages arising from the same claim"); *McDaniel v. City of Lakeland,* 304 So.2d 515 (Fla. 2nd DCA 1974) (affirming denial of writ of mandamus because the petitioner could file a separate action for declaratory judgment or for damages to secure the relief he sought in mandamus petition). The Plaintiffs' request for declaratory relief conclusively shows that mandamus is not necessary.

III. THE COUNTY'S INCORPORATION PROCEDURE IS CONSTITUTIONAL.

The Plaintiffs also seek a declaration that the County's incorporation ordinance is unconstitutional because it treats past incorporation requests differently than current requests and caused intentional delay in the consideration of the Redland incorporation request. The Plaintiffs contend that this disparate treatment violates the Equal Protection Clause and constitutes an "ex post facto" law and a "bill of attainer [sic]." The Plaintiffs do not have standing because a declaration that the challenged provision of the ordinance is unconstitutional will not enable them to proceed with incorporation even if their claim is assumed to be justiciable otherwise. Moreover, there is nothing irrational about treating different incorporations differently.

A. The Plaintiffs Do Not Have Standing To Challenge The Procedures They Allege Are Unconstitutional.

Before considering the merits of the request for declaratory and injunctive relief, the Court must determine if the Plaintiffs have standing to challenge the provisions of the County's incorporation rules they claim are unconstitutional. The Plaintiffs allege that the County

violated their constitutional rights by treating their request for incorporation differently than it has treated past incorporation efforts. Specifically, they allege that the Commission adopted a rule, codified as Miami-Dade County Code §20-29, that "had the effect of stopping the Redland incorporation efforts." *Complaint at 32.* Section 20-29 provides that where a commissioner sponsors the creation of a municipal advisory committee for a proposed municipality that includes areas outside the sponsoring commissioner's district, those areas are to be excluded unless the commissioner whose district includes those areas consents to their inclusion.

This Code provision is not what has prevented the Plaintiffs' incorporation request from going forward. First, Section 20-29 was adopted in July 2002, well after the County Commission's initial decision in November 2001 to defer the Redland incorporation request. Second, a municipal advisory board, as its name implies, is merely an advisory board to the County Commission. There is simply nothing in either the County's Home Rule Charter or in its code of ordinances that requires the County Commission even to receive a MAC recommendation prior to its taking action on an incorporation request. Third, the Redland petition has actually proceeded under the Code without input from a MAC.

If a judicial declaration that a statute or ordinance is unconstitutional will not benefit the party seeking the declaration, that party does not have standing. *Sasnett v. Tampa Elec. Co.* 513 So.2d 157, 159 (Fla. 2nd DCA 1987). The court dismissed a challenge to another County ordinance on this basis in *Kern v. Miami-Dade County,* 766 So.2d 1080 (Fla. 3rd DCA 2000). In that case, the plaintiff sought a declaration that an ordinance requiring a 2/3 vote of the commission to approve a rezoning request was unconstitutional. Because the plaintiff's rezoning request was rejected unanimously, however, the court concluded that the plaintiff lacked standing to challenge the constitutionality of the ordinance because he would not benefit from a finding that the ordinance was unconstitutional.

Similarly, in this case a declaration that § 20-29 is unconstitutional would not benefit the Plaintiffs because Section 20-29 is not what is preventing the incorporation of the Redland.

B. It Is Rational To Treat Current Incorporation Efforts Differently Than Past Incorporation Efforts.

Even if the Plaintiffs could somehow get past their lack of standing, they would not be entitled to a declaration that § 20-29 is unconstitutional. The Plaintiffs contend that § 20-29 violates the Equal Protection Clause because it treats incorporation efforts pending at the time the rule was adopted differently than those incorporation efforts that were completed before the rule and that this difference in treatment is "irrational." This claim, as the Petition recognizes, is governed by the rational basis test.

Under the rational basis test, "a statute is presumed constitutional, and the burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it." *Heller v. Doe by Doe,* 509 U.S. 312. 320-321, 113 S. Ct. 2637, 125 L. Ed. 2d 257 (1993) (emphasis added). "Moreover, because we never require a legislature to articulate its reasons for enacting a statute, it is entirely irrelevant for constitutional purposes whether the conceived reason . . . actually motivated the legislature . . . . In other words, a legislative choice is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data." *Williams v. Pryor*, 240 F.3d 944, 948 (11th Cir. 2001) (emphasis added); *accord, Haves v. City of Miami,* 52 F.3d 918, 923 (11th Cir. 1995). Applying the highly deferential rational basis standard, it is readily apparent that § 20-29 is constitutional. It was enacted for the entirely rational purpose of ensuring that the residents of the districts most directly affected by a proposed incorporation have an effective voice in the process.

The Plaintiffs' argument that § 20-29 is unconstitutional once again overlooks the plenary authority the states possess over the political decision to incorporate a new city. *Hunter,* 207 U.S.

at 178; *Wisconsin Public Intervenor v. Mortier*, 501 U.S. 597, 608 (1991); *Lockport v. Citizens for Community Action,* 430 U.S. 259, 269 (1977). *Palmetto* Bay, 744 So.2d 1076. The states' "absolute discretion" over the creation of municipalities forecloses any suggestion that the County cannot limit incorporation or adopt and change incorporation procedures. *Hunter,* 207 U.S. at 178. Indeed, the courts have consistently rejected claims like this from citizens demanding the right to decide whether or not to incorporate a new city. *See, e.g., City of Ormond Beach v. City of Daytona Beach*, 794 So.2d 660, 664 (Fla. 5th DCA 2001) ("A court has no authority absent illegality or fraud, to enjoin a legislative act such as the power to annex."); *Board of Supervisors of Sacramento County v. Local Agency Formation Commission*, 838 P.2d 1198, 1204 (Cal. 1992), *cert. denied*, 505 U.S. 988 (1993). ("[T]he right to vote does not include a right to compel the state to provide any electoral mechanism whatever for changes of municipal organization. Such line-drawing is a function that the Legislature may reserve to itself."); *Baldwin v. City of Winston-Salem*, 710 F.2d 132 (4th Cir. 1983) (Including some areas for annexation and excluding others does not create a suspect classification and therefore does not abridge the Fourteenth Amendment). The Plaintiffs have not alleged that the County's limitations on incorporation infringe upon any fundamental right or suspect class.

The limitations the County has imposed are well within the broad political discretion afforded to the States in matters of local government structure. The Florida Constitution gives the County Commission plenary power over the creation of municipalities within the County's borders. *Palmetto Bay,* 744 So.2d 1076; *see State v. Dade County,* 142 So.2d 79, 86 (Fla. 1962) ("Under the Constitution of this state plenary power exists in the legislature over all municipalities of this state. This power, formerly residing in the legislature insofar as municipal corporations of Dade County are concerned, as limited by the Home Rule Charter, is now vested in the Board of County Commissioners and may be exercised by said Board."). The County's

plenary power over the creation of municipalities within the County's geographic borders includes the authority to impose limitations on incorporation.

The Plaintiffs' specific contention that it is irrational to treat new incorporation efforts differently than previous ones was rejected in *Levy v. Miami-Dade County,* 254 F. Supp.2d 1269, (S.D. Fla. 2003), *aff'd,* 358 F.3d 1303 (11th Cir. 2004). In that case, a group of unincorporated area citizens alleged that it was irrational to treat incorporation efforts completed before a Charter Amendment limiting incorporation differently than incorporation efforts completed after the Amendment. As here, the *Levy* Plaintiffs argued "that the conditions which the County is imposing on new municipalities are non-uniform and that the differences cannot be explained by any rational basis." *Id.* at 1292.

The Court held that the Plaintiffs' claims were governed by the rational basis test. "Applying that highly deferential standard," the Court concluded that the Plaintiffs had "not demonstrated that the Charter Amendment is irrational on its face or as applied." *Id.* The Court explained that there is nothing irrational about treating incorporation applications differently depending on when they are received. In fact it is well established that applying a new rule only to pending matters is not irrational. *Id.,* citing, *Nordlinger v. Hahn,* 505 U.S. 1, 11-12 (1992) and *Haves v. City of Miami,* 52 F.3d 918 (11th Cir. 1995). Frankly, the Plaintiffs have no more standing to complain that the County is acting arbitrary with regard to incorporation than a guest in one's home has to complain that the homeowner living arrangements or decorations are unreasonable. That indeed may be the case, but it is within their discretion to arrange the house/County as they see fit.

The Court also rejected a contention, much like the Plaintiffs' here, that the County is bound to treat all pending incorporation requests in a uniform manner. The *Levy* Plaintiffs argued that the County's incorporation decisions were essentially "*ad hoc* because they are

negotiated individually with each new proposed municipality in the absence of any uniform standards" and actually "presented evidence suggesting that [the County] can be highly arbitrary in imposing these conditions on incorporation having on at least one occasion altered the terms after an agreement had been reached with the County Manager." *Id.* at 1292-93. The Court held that such different treatment is not only constitutionally permissible, it is required in light of the wide variety of factors that go into the incorporation process:

> [I]n a county of this size and diversity, the incorporation of each area will impact the remainder of the County in various ways to varying degrees. No doubt, some areas are wealthy, some poor, some largely industrial, some largely residential, some crime-ridden, some with little crime at all. Thus, it is not wholly irrational for the County, when establishing political subdivisions, to reserve to itself the ability to tailor conditions to a particular area, treating each incorporating community differently, subject only to the confines of the Florida Constitution.

Id. at 1296 n.35 (citations omitted). The Eleventh Circuit affirmed the District Court's decision in all respects. *Levy*, 358 F.3d 1303.

As in *Levy*, the Plaintiffs here argue that the County's incorporation decisions violate equal protection because they are not uniform for all proposed municipalities, but there is nothing irrational about treating different incorporations differently. "'Equal treatment consists not only of treating like things alike, but also of treating unlike things differently according to their differences.'" 254 F. Supp.2d at 1296 n.35, quoting from, *Lyes v. City of Riviera Beach,* 166 F.3d 1332, 1342 (11th Cir. 1999). The County incorporation process properly "respects the differences" between various incorporation requests. *Id.* Each area that seeks to incorporate has its own unique advantages and disadvantages. It would be irrational to treat all such areas exactly the same. Instead, the County treats each incorporation individually, giving consideration in each instance to the particular needs of the area under consideration.

The Plaintiffs have not shown that the County's incorporation procedures are irrational. As is plainly evident from the allegations of the complaint, there have been longstanding concerns and disputes regarding the boundaries of the Redland incorporation proposal. *Complaint* ¶¶ *26, 33.* There is nothing irrational about deferring the incorporation petition in order to allow residents of the areas most affected by an incorporation request to try to resolve their boundary disputes among themselves.

B. The County's Incorporation Ordinance Is Not an Ex Post Facto Law or a Bill of Attainder.

Finally, the Plaintiffs allege that by changing procedures in the midst of their efforts to incorporate, the County has violated the Constitutional prohibitions against "ex post facto" laws and "bills of attainer [sic]."

"The constitutional prohibition against ex post facto laws applies only to criminal legislation and proceedings." *Ridgeway v. State,* 892 So.2d 538 (Fla. 1st DCA 2005); *see Goad v. Dept. of Corr.,* 845 So.2d 880, 882 (Fla.2003). It has no application to this civil dispute.

The prohibition against bills of attainder applies to *some* civil matters, but it does not prohibit all laws that treat some groups differently than others. It prohibits only those legislative acts that are aimed at punishing specific individuals for past conduct without a trial. *See Nixon v. Administrator of General Services,* 433 U.S. 425, 470-473, 97 S.Ct. 2777, 2804 - 2805 (1977); *Selective Serv. Sys. v. Minnesota Pub. Interest Research Group,* 468 U.S. 841, 846-47, 104 S.Ct. 3348, 82 L.Ed.2d 632 (1984) (A bill of attainder is "a law that legislatively determines guilt and inflicts punishment upon an identifiable individual without provision of the protections of a judicial trial.").

The County rule the Plaintiffs challenge is not aimed at them specifically, but instead covers all persons seeking to incorporate cities whose geographic borders spread over two or more County Commission districts. Moreover, the Ordinance's requirements are not

"punishment." The courts have defined "punishment" as criminal sanctions, civil fines and the like; it does not include the imposition of procedural burdens upon those seeking a governmental benefit. Characterizing a bill of attainder in such a broad manner as the Plaintiffs attempt to do, "obviously proves far too much." *Nixon,* 433 U.S. at 470. As the Supreme Court has explained:

> By arguing that an individual or defined group is attainted whenever he or it is compelled to bear burdens which the individual or group dislikes, appellant removes the anchor that ties the bill of attainder guarantee to realistic conceptions of classification and punishment. His view would cripple the very process of legislating, for any individual or group that is made the subject of adverse legislation can complain that the lawmakers could and should have defined the relevant affected class at a greater level of generality. Furthermore, every person or group made subject to legislation which he or it finds burdensome may subjectively feel, and can complain, that he or it is being subjected to unwarranted punishment. *United States v. Lovett, supra,* 328 U.S., at 324, 66 S.Ct., at 1083 (Frankfurther, J., concurring). However expansive the prohibition against bills of attainder, it surely was not intended to serve as a variant of the equal protection doctrine, invalidating every Act of Congress or the States that legislatively burdens some persons or groups but not all other plausible individuals. In short, while the Bill of Attainder Clause serves as an important 'bulwark against tyranny.' *United States v. Brown*, 381 U.S., at 443, 85 S.Ct., at 1712, it does not do so by limiting Congress to the choice of legislating for the universe, or legislating only benefits, or not legislating at all.

Id. at 470-471.

The County's incorporation rule is not aimed solely at the Plaintiffs, but even if it was it still would not constitute a bill of attainder because it imposes no burden that can legitimately be characterized as punishment. *See, e.g., Mayes v. Moore*, 827 So.2d 967, 972 (Fla. 2002) (A statute that "does not punish specific individuals for acts already committed . . . is not a bill of attainder"); *Wilson v. Yaklich* 148 F.3d 596, 605-606 (6th Cir. 1998) (statute that prevented indigent prisoners from filing civil actions after having had at least three prior cases dismissed as frivolous was not a bill of attainder because it was not aimed at individuals and did not impose punishment); *Siegel v. Lyng* , 851 F.2d 412, 418 (C.A.D.C. 1988) (act imposing civil penalty to

assist in regulatory enforcement of a statute was not a bill of attainder) *Gardner v. City of Columbus*, 841 F.2d 1272 (6th Cir. 1988) (where fines for violations of city parking ordinance were part of comprehensive regulatory scheme, they were civil, rather than criminal, and did not impose punishment, and, thus, ordinance was not a bill of attainder).

CONCLUSION

Whether or not to move forward on a request to incorporate is a "purely discretionary political decision" for the County Commission. *Palmetto Bay*, 744 So.2d 1076. Nothing in the incorporation provisions of the County Code limits the Commission's discretion in making this political decision.

The Court concludes that the petition for mandamus must be denied because under a plain reading of the incorporation provisions of the Code Plaintiffs cannot show that they have a clear legal right to move the incorporation process forward, including their demand for a public hearing "forthwith" before the County Commission.

The Plaintiffs do not have standing to seek the requested declaratory relief on their constitutional claims. Even if Plaintiffs did have standing and these claims otherwise were justiciable, the only declaration they would be entitled to is that the County's incorporation procedures are constitutional.

Accordingly, the County's motion for judgment on the pleadings is **GRANTED** and final judgment is hereby entered in favor of the Defendant and against the Plaintiffs.

DONE and **ORDERED** this _____ day of MAY 04 2005, 2005.

JON I. GORDON, CIRCUIT JUDGE

CIRCUIT COURT JUDGE

Copies furnished to:

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